Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHROP CORPORATION,

Petitioner,

v.

UNITED STATES *ex rel.*
LEOCADIO BARAJAS,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether, under the civil False Claims Act, 31 U.S.C. § 3730(e)(4), an individual who first discovers all of the information on which his allegations are based from the news media may still qualify as an "original source" of those allegations, and thereby maintain subject matter jurisdiction in the district court.

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PETITION FOR A WRIT OF *CERTIORARI*

Northrop Corporation ("Northrop") petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) was ordered published and reported at 5 F.3d 407. The opinion of the district court (App., *infra*, 12a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1993. A timely petition for rehearing was denied on December 29, 1993 (App., *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTE

The Civil False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, is reprinted in the Appendix (App., *infra*, 21a-31a). This petition specifically involves 31 U.S.C. § 3730(e)(4) which provides:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT

A. Introduction

The *qui tam* jurisdictional provisions of the civil False Claims Act, set forth in 31 U.S.C. § 3730(e)(4), reflect Congress' attempt to seek "the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own ...."

United States ex rel. Springfield Terminal Railway Co. v. Quinn, No. 92-7157, 1994 U.S. App. LEXIS 1963 at *9 (D.C. Cir. 1994).[1] The very efficacy of the statute, therefore, depends upon a proper interpretation and application of those provisions by the federal judiciary. Five U.S. Courts of Appeals have ruled that the Act establishes a two-part test for determining jurisdiction: First, the Court must determine whether the allegations or transactions on which the action is based were "publicly disclosed." Second, if public disclosure has occurred, the Court must determine whether the *qui tam* plaintiff qualifies as an "original source." Only the Ninth Circuit has merged these two separate inquiries into a single test involving a determination of whether the *qui tam* plaintiff "played some part, whether direct or indirect, in the public disclosure of the allegations . . . ." App., *infra*, 8a. In combining these two inquiries, the Ninth Circuit has ignored the language of the Act, contradicted the rulings of five (5) other Circuits, and effectively undermined the very purpose of the jurisdictional limits as articulated and established by Congress.

B. The Statutory Scheme

The civil False Claims Act, originally known as the "Lincoln Law," was passed during the Civil War to allow the United States to recover for fraudulent claims submitted to the Government. The Act now provides for treble damages, plus penalties of $5,000 to $10,000 for each false claim. From its inception, the False Claims Act included "*qui tam*" provisions allowing individuals, called "relators," to sue on behalf of the United States even if the Department of Justice chose not to prosecute the civil action. Originally, the Act allowed the relator to recover 50 percent of any recovery. The Act now allows a relator to receive an award of between 25 percent and 30 percent if the Government does not intervene and take over the case.

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[1] A *qui tam* relator sues on behalf of the United States. The phrase "*qui tam*" is the abbreviation for the phrase "*qui tam pro domino rege quam pro seipso*," which means "he who as much for the king as for himself."

The original 1863 language of the statute had no restrictions on the types of allegations that could be asserted by private *qui tam* relators. As a result, this Court ruled in 1943, in the now-famous case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537(1943), that a *qui tam* relator who filed a civil False Claims Act case based solely on public information in a criminal indictment could recover up to 50 percent of the amount recovered by judgment or settlement. This decision, roundly criticized as allowing "parasitic" suits, resulted in the 1943 amendments to the Act which granted subject matter jurisdiction over a *qui tam* suit only if the United States had no prior knowledge of the information or the allegations before the *qui tam* suit was filed.[2]

The jurisdictional requirement of no "prior government knowledge" sharply limited private *qui tam* enforcement. In *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the court dismissed on jurisdictional grounds a *qui tam* action brought by the State of Wisconsin even though the State had developed the fraud case and presented it to the Federal government for prosecution before filing the *qui tam* action. The court dismissed the action based on the United States' "prior knowledge" of the allegations — knowledge supplied by the State. 729 F.2d at 1103. The decision in *Dean* was an important factor in Congress' decision to amend the Act in 1986. In these 1986 amendments, Congress sought to achieve a reasonable balance: on the one hand, overturning decisions such as *Dean* and encouraging private citizens and state governments in ferreting out and pursuing fraud against the Government; while on the other hand, disallowing mere "parasitic" suits such as in the *Hess* case, where private citizens simply refile as allegations

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[2] An early draft of the 1943 legislation provided that a *qui tam* relator could prosecute the action if that relator was an "original source" of the allegations. That provision was deleted in the final version of the bill. *See United States ex rel. LeValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354-55 (D. Mass. 1988).

information already disclosed in the public media and receive up to 30 percent of any judgment or settlement.

The balance Congress sought to achieve is reflected in the language in 31 U.S.C. § 3730(e)(4) of the Act. Subsection 3730(e)(4)(A) provides that no court shall have subject matter jurisdiction over a suit brought by a *qui tam* relator if the suit is based on "the public disclosure of allegations or transactions" unless the relator is an "original source" of the information. Subsection 3730(e)(4)(B) of the Act defines an "original source" as one who (1) "has direct and independent knowledge of the information on which the allegations are based," *and* (2) "has voluntarily provided the information to the Government before filing a [*qui tam*] action."

Since enactment in 1986, the "original source/public disclosure" provisions have been the subject of numerous district and appellate court decisions. Five U.S. Courts of Appeals - the Second, Third, Seventh, Tenth and District of Columbia Circuits — and numerous federal district courts have ruled that § 3730(e)(4) means what it says, holding that federal courts have no jurisdiction over cases brought by relators who base their lawsuits solely on *public* allegations. In contrast, the Ninth Circuit has adopted a test that conflicts both with the rulings of these Courts of Appeals and with Congress' plain intent by interpreting Section 3730(e)(4)(B) to allow jurisdiction where the relator bases his allegations on a publicly-disclosed indictment, lacks any direct and independent knowledge, and does not provide any information to the Government regarding the allegations prior to filing suit. Thus, the Ninth Circuit ruled that there is jurisdiction over a claim brought if the relator only "plays some part in the public disclosure" of the allegations.

C. Factual Background

1. Plaintiff Leocadio Barajas was a test engineer at Northrop's Western Service Department ("WSD") in Pomona, California. WSD was part of Northrop's Precision Products

Division ("PPD") in Massachusetts. Northrop had a subcontract with the Boeing Company to build and test one component of the Air Launched Cruise Missile ("ALCM"). That component was known as a "Flight Data Transmitter" or "FDT." From 1985 to 1987, both upon instructions from his supervisors in California, and on his own initiative, Barajas falsified a number of tests and inspections required to be performed on the Flight Data Transmitter. In January 1987, Barajas and another Northrop employee disclosed these test and inspection falsifications at Barajas' facility in California to Federal investigators, who immediately began to investigate the allegations.

2. In October 1987, Barajas filed a *qui tam* suit under the False Claims Act based solely on these same test and inspection falsifications. The Department of Justice investigated Barajas' allegations at length, intervened in the *qui tam* suit, and filed an amended complaint. Barajas did not oppose the Government's amended complaint and failed even to serve his own original complaint. The United States and Northrop ultimately settled this testing and inspection case for $8 million in July 1991. Barajas and his then co-plaintiff, as part of a separate settlement agreement, agreed to the dismissal of the Government's case and all individual wrongful discharge claims for a payment of $750,000. Barajas (and his former co-plaintiff) also received from the government, in addition to this $750,000, an additional $864,000 of the $8 million as a "bounty" or reward for "blowing the whistle" on the test and inspection fraud at WSD.[3]

3. In the meantime, in April 1989, a Federal grand jury in Los Angeles issued an Indictment charging Northrop as follows:

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[3] Barajas would normally have been entitled to a minimum of 15 percent, or $1.2 million, of the $8 million settlement. The district court, however, reduced his award to 11 percent under 31 U.S.C. § 3730(d)(3), in part because of his voluntary personal involvement in the test falsifications. Barajas did not appeal the district court's ruling.

- First, that WSD personnel in California (including Barajas) had falsified test and inspection reports on the Flight Data Transmitter. These were the allegations in Barajas' original *qui tam* complaint. Northrop ultimately pled guilty to these charges.
- Second, that Northrop PPD personnel in Massachusetts had knowingly *designed* the gyroscope installed in the FDT to use damping fluid that did not meet the cold temperature requirements in the Air Force contract. Northrop vigorously fought these allegations and the Government ultimately dismissed them with prejudice. Barajas played no role in the design phase, which obviously took place years before the test and inspection falsifications and in a separate facility in Massachusetts. Northrop bitterly fought these allegations, and they were ultimately dismissed with prejudice by the government.

4. In the proceedings below, the District Court found — as a matter of *fact* — that the "damping fluid/cold temperature" allegations in the Indictment arose from a lead obtained by the Assistant U.S. Attorney in grand jury testimony and not from Barajas' *qui tam* suit. Assistant U.S. Attorney Fahey explained the discovery of these gyroscope damping fluid allegations in a Declaration submitted to the District Court as part of an *amicus* brief filed by the Department of Justice in support of Northrop's motion to dismiss:

> 2. I supervised the criminal investigation that led to the indictment of Northrop . . . Among the documents that I reviewed was a memorandum that stated that the damping fluid that Northrop was using in the FDTs would freeze at cold temperatures. This memorandum and others produced with it was the first information that the government received regarding Northrop's use of defective damping fluid in the FDTs. It was these documents that triggered the

government investigation of the damping fluid problem.

3. The government was unaware of the fluid issue before we received the documents responsive to the subpoena. The subpoena that led to production of the documents concerning the fluid problem actually addressed a separate matter concerning the ball bearings used in some of the FDT gyroscopes.

4. The matter concerning the ball bearings was developed in grand jury testimony. That testimony was not provided by Leo Barajas and had no relation to any information he provided. [CR 342].

5. This April 1989 Indictment, including the damping fluid/cold temperature allegations, was highly publicized in the local and national media, with substantial coverage in the Los Angeles area where Northrop's headquarters are located and where Barajas and his counsel reside. After the Indictment and the attendant publicity, counsel to Barajas for the first time contended that his original *qui tam* complaint also included these "damping fluid" allegations, even though his original complaint made no mention of "cold temperature," "damping fluid," or any other related allegation. Both Northrop and the Department of Justice disagreed with Barajas, and the District Court twice ruled that these cold temperature/damping fluid allegations were wholly unrelated to the testing allegations he had raised and were not included in the civil case.[4]

6. In fact, it was not until March 1991 — two years after public disclosure of these allegations in the Indictment — that

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[4] As a result, it is conclusively determined, for purposes of this appeal, that the damping fluid allegations (a) were not alleged by Barajas in his original 1987 *qui tam* suit, (b) were not alleged by the Government when it intervened and filed its First Amended Complaint in that suit, and (c) were not alleged in any *qui tam* action prior to public disclosure of those allegations in the 1989 Indictment.

Barajas served his own "First Amended and Severed *Qui Tam* Complaint" which set forth in an entirely separate action, for the first time, the damping fluid/cold temperature allegations. In answers to interrogatories and in deposition testimony, Barajas admitted that the allegations in his Amended *Qui Tam* Complaint were "based upon" the public Indictment, and that he had first heard of the damping fluid allegations from news media reports, "probably" in the *Los Angeles Times*. Indeed, the allegations in Barajas' complaint virtually repeat, word for word, the allegations of the Indictment. The Government did not intervene in this new damping fluid/cold temperature case.

D. Proceedings Below

1. Northrop moved to dismiss Barajas' Amended *Qui Tam* Complaint for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4), a motion supported by the Department of Justice. The District Court issued a Memorandum and Order (App., *infra*, 12a-19a) dismissing Barajas' "First Amended and Severed *Qui Tam* Complaint" for lack of subject matter jurisdiction. Based on these facts and the language of 31 U.S.C. § 3730(e)(4)(A), the District Court ruled that these new allegations were "publicly disclosed" before Barajas first raised them in his Amended *Qui Tam* Complaint. App., *infra*, 14a-16a. The court also ruled, based on Barajas' admission that he learned about the damping fluid/cold temperature allegations from the public media, that Barajas did not satisfy the original source requirements of Section 3730(e)(4)(B) because: (1) he did not have direct and independent knowledge of the information on which the damping fluid allegations were based; and (2) if he had any such information, he never provided that information to the Government before filing his *qui tam* suit. App., *infra*, 16a-19a.

2. On December 29, 1993, the Court of Appeals for the Ninth Circuit reversed. The decision ignored the District Court's factual findings (1) that the "damping fluid/cold tem-

perature" allegations were based upon publicly disclosed information, and (2) that Barajas had no "direct and independent knowledge" of these allegations and reversed the District Court's conclusion that Barajas was not an original source. The Ninth Circuit contradicted the prior rulings of the Second, Third, Seventh and Tenth Circuits by instead fashioning its own test that has no basis in the relevant statutory language or legislative history. Thus, the decision created a single "trigger" test — that is, if a relator "play[s] any part" in (or "triggers") an investigation of allegations which lead to a public disclosure of different allegations, by however circuitous and attenuated the route, the relator would satisfy the original source requirements of Section 3730(e)(4).

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant *certiorari* to resolve a conflict in the Circuits concerning the subject matter jurisdiction of the federal courts in *qui tam* cases and the proper interpretation of Section 3730(e)(4). Since the 1986 amendments were passed, there have been at least ten Circuit court decisions interpreting the "original source" and "public disclosure" provisions of Section 3730(e)(4), and at least twice as many district court decisions. Many of these decisions resulted from motions made by the Department of Justice, which filed an *amicus* brief here in the District Court urging dismissal of Barajas' cold temperature allegations. As the civil False Claims Act becomes a more common tool not only in procurement fraud, but also in combating health care fraud, setting the proper interpretation of what constitutes "public disclosure" and "original source" is essential. With different rules in different Circuits, recovery of a reward by a relator now depends not on whether recovery is appropriate based on the legislative intent adopted by Congress, but on the geographic location where the relator manages to bring suit.

Resolution of the jurisdictional issue is particularly critical now in light of the Supreme Court's recent denial of the petition for *certiorari* in *The Boeing Company v. United States of America ex rel. Kelly*, No. 93-817, which involved a challenge to the constitutionality of the *qui tam* provisions.[5] The jurisdictional limits established by Congress now stand as the crucial means by which parasitic suits are to be avoided. Thus, this Court should grant *certiorari* to decide whether the Ninth Circuit's fashioning of the "trigger" test is the appropriate interpretation of Section 3730 or whether the decisions of the Second, Third, Seventh, Tenth and District of Columbia Circuits, which implement the literal language and Congressional intent of Section 3730, are correct.[6]

A. The Ninth Circuit's "Trigger" Test For Original Source Status Conflicts With The Rulings Of Five Other Circuit Courts Of Appeals

Section 3730(e)(4) provides that a suit brought by a *qui tam* relator under the False Claims Act is barred if it is based on publicly disclosed allegations or transactions unless the United States intervenes (in which case, subject matter jurisdiction is established on the basis of the Attorney General's active role) or unless the *qui tam* relator is an "original source." Section 3730(e)(4)(A) defines "public disclosure" to include disclosure in a criminal indictment or in the news media. The definition

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[5] The Supreme Court denied the petition on February 22, 1994.

[6] *See United States ex rel. Dick v. Long Island Light Co.*, 912 F.2d 13 (2d Cir. 1990); *United States ex rel. Kreindler v. United Technologies*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, No. 92-7157, 1994 U.S. App. LEXIS 1963 (D.C. Cir. 1994); *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *Houck on Behalf of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); and *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993).

of "original source" is set forth in the next section, 31 U.S.C. § 3730(e)(4)(B), which defines an "original source" as an individual who (1) "has direct and independent knowledge of the information on which the allegations are based," and (2) "has voluntarily provided that information to the Government before filing a [*qui tam*] action."

In *United States ex rel. Dick v. Long Island Lighting Co.*, the Second Circuit required that a relator (1) have direct and independent knowledge of the information on which the allegations are based *and* (2) provide that direct and independent information to the Government, pursuant to Subsection (e)(4)(B). *Dick*, 912 F.2d at 16. The Second Circuit, after reviewing the legislative history, then added a *third* requirement to establish "original source" status:

> ¶ (4)(A) contains an *additional* requirement to be considered an 'original source,' namely, that to be considered an 'original source,' one must have been a source to the entity that first publicly disclosed the information on which a suit is based. (Emphasis added). [*Dick*, 912 F.2d at 17].

In *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), the Ninth Circuit, in direct reliance on the express language of Section (e)(4)(B), stated:

> Where an allegation has been publicly disclosed within the meaning of section 3730(e)(4)(A), a plaintiff may only bring a *qui tam* suit if he can show that (1) he has 'direct and independent knowledge of the information on which his allegation is based'; and (2) that he 'has voluntarily provided the information to the Government before filing' his *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). [975 F.2d at 1417].

In addressing the mandatory requirement in Subsection (e)(4)(B) that the relator "have direct and independent knowl-

edge of the information on which the allegation is based," the *Wang* court explained:

> Wang had personal knowledge of the Bradley's transmission problems because he worked (however briefly) on trying to fix them. The fact that someone else publicly disclosed the Bradley's transmission problems does not rob Wang of what he saw with his own eyes. Wang's knowledge of the transmission problems was 'direct and independent' because it was unmediated by anything but Wang's own labor. *Id.*

Thus, the *Wang* Court found that "direct and independent knowledge" is personal, such as the knowledge of an eyewitness, and concluded that Mr. Wang had such personal knowledge. In so holding, the Ninth Circuit was following the rulings of the Second, Third, Seventh and Tenth Circuits.

Despite finding that Mr. Wang had such "direct and independent knowledge of the information on which the allegations are based," as required by Subsection (e)(4)(B), the Ninth Circuit held that he was not an original source because he failed to satisfy an *additional* requirement in Section 3730(e)(4)(A). Citing the Second Circuit's decision in *Dick*, the *Wang* court held:

> The Second Circuit has held that, under section (4)(A), a *qui tam* plaintiff 'must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.' *Dick*, 912 F.2d at 16. We agree with the Second Circuit. To bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit. [*Id.* at 1418].

In its decision in *Barajas*, however, the Ninth Circuit expanded its holding in *Wang* to transform this *additional* requirement — triggering the public disclosure — into the *only*

requirement, stating: " . . . Barajas is 'an original source' with respect to a proposed amendment [*i.e.*, the new damping fluid allegations] if he *played some part*, whether direct or indirect, in the public disclosure of the allegations that are the subject of the proposed amendments." App., *infra*, 8a. (emphasis added).

The other Circuits which have addressed this issue have ruled *unanimously* that a *qui tam* suit under the False Claims Act, in which the Government does *not* intervene, must be dismissed for lack of subject matter jurisdiction under Section 3730(e)(4) where the *qui tam* relator did not have "direct and independent knowledge of the information on which the allegations are based." None of the courts adopted the "trigger" test as the sole basis for "original source" status. None of these courts stated that a relator satisfies the "original source" test if, without having direct and independent knowledge of the information, he or she simply "'played some part' in the public disclosure" of the allegations. App., *infra*, 8a.

In contrast to the Ninth Circuit's decision in *Barajas*, the District of Columbia Circuit held in *Springfield Railway* that other Circuits had properly construed the definition of original source "to impose a conjunctive requirement — direct and independent — on qui tam plaintiffs." *Springfield Railway*, 1994 U.S. App. LEXIS at *38. The District of Columbia Circuit went on to hold that the Act required "direct and independent knowledge of any essential element of the underlying fraud transaction." *Id.* at *40. The Tenth Circuit in *Precision* went even farther and specifically held that a relator must have *personal* knowledge of *all* information on which the relator's allegation is based. 971 F.2d at 554. In *Stinson*, the Third Circuit ruled that, to be an original source, "the relator must possess substantive information about the particular fraud, rather than merely background information . . . ." 944 F.2d at 1160. Moreover, said the Third Circuit Court of Appeals, that information must be direct and not obtained through "interme-

diaries." *Id.* In *Kreindler*, the Second Circuit held that the relator must be dismissed since he had "no significant direct knowledge" of the alleged wrongdoing. 985 F.2d at 1159. In *Houck*, the unsuccessful relator would not have learned of the allegations "absent public disclosure." 881 F.2d at 505 (1989). All of these decisions conflict with the new single "trigger" test established by the Ninth Circuit.[7]

The trigger test adopted by the Ninth Circuit in *Barajas* as the *sole* requirement for original source status is in reality the

[7] The Ninth Circuit's rationale for its departure from *Dick*, *Precision*, *Houck*, *Stinson*, and even *Wang* is based upon its recitation of a statutory provision and legislative history which have *nothing* to do with this case. In interpreting Section 3730(e)(4), the Ninth Circuit relies on the language and legislative history of § 3730*(d)(1)*, without understanding the critical difference between Subsection (d) and Subsection (e)(4).

The Ninth Circuit properly states that under Subsection (d)(1), a relator may rely on publicly disclosed information. What the Ninth Circuit does not recognize is that Subsection (d)(1), which begins with the phrase "If the Government proceeds with the action . . .," is limited *by its express terms* to situations in which the Government intervenes as a party, and is concerned *solely* with how much may be awarded to a *qui tam* plaintiff in that situation. In such cases, there is no question of subject matter jurisdiction because the Government is an active party plaintiff in the suit. The Ninth Circuit wholly ignores this critical distinction, which causes the Ninth Circuit's decision in *Barajas* to conflict directly with the Tenth Circuit's decision in *Precision*, where the Court of Appeals explained:

> [Relator] asserts § 3730(d)(1) supports its interpretation that only actions *solely* based on public disclosures are potentially barred. We disagree. Although § 3730(d)(1) allows the court to determine fees in a *qui tam* action partly based on public information, § 3730(d)(1) is not a jurisdictional provision. Moreover, its application is limited to those cases in which the government proceeds. The government has elected not to proceed in the present case; therefore § 3730(d)(1) is not germane to this analysis. [971 F.2d at 553 n.3].

Since the government has not intervened in Barajas' Amended *Qui Tam* Complaint containing these new allegations, Section 3730(d)(1) is likewise "not germane" to this case.

same as the *third* mandatory requirement set by the Second and Tenth Circuits. The existence of this *third* requirement — "playing a part" in the public disclosure — was recognized as an additional requirement by the Tenth Circuit in *Precision*. 971 F.2d at 553 n.4.

These Circuit decisions in *Dick* and *Precision* establish also that meeting this "trigger" test — "playing a part in the public disclosure" — is only one step in determining whether a relator is an original source. If the relator "played a part" in the public disclosure, the additional statutory requirements in Subsection (e)(4)(B) must then be proven by the *qui tam* relator. Under these Circuit court decisions, if Barajas "played a part in the public disclosure," he satisfies only the first test under Subsection (e)(4)(A); he still must satisfy Subsection (B) — that is, he must have had "direct and independent knowledge of the information" regarding the damping fluid allegations and must have "voluntarily provided that information to the Government," as required by the express terms of Subsection (B).

In sum, the Ninth Circuit in *Barajas* has transformed a *third* jurisdictional requirement into the *sole* test for original source status and eliminated the clear statutory mandate in Section (e)(4)(B) — that a relator have "direct and independent knowledge of the information on which the allegation is based and voluntarily provide that information to the government." This misapplication of precedent, and misreading of the law, leads to the absurd result of a relator being the "original source" of allegations he first learns of in the newspaper.

B. The Ninth Circuit's "Trigger Test" for Public Disclosure Conflicts With The Clear Statutory Language Of The False Claims Act And Established Precedent

The Ninth Circuit, while citing the District Court's factual findings that Barajas' damping fluid claims were raised *after* the public Indictment and widespread published media reports of

the Indictment, App., *infra*, 9a, rejected the District Court's ruling that the damping fluid allegations in Barajas' Amended *Qui Tam* Complaint were "based upon" publicly disclosed information. The Ninth Circuit reached this anomalous result by ignoring the language of the statute, the unchallenged findings of fact, and the holdings of the Second, Third and Tenth Circuits.

The statutory language is clear:

> § 3730(e)(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal . . . hearing . . . or from the news media . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Applying this language to the undisputed facts found by the District Court, there should be no doubt that this "action" — the relator's Amended *Qui Tam* Complaint raising the damping fluid allegations for the first time — is "based upon the public disclosure of allegations" in the Indictment and the news media.

Despite Barajas' admissions that he based his cold temperature allegations on a public Indictment and the media reports, the Ninth Circuit concluded as follows:

> We stated in *Wang* that "[e]vidence publicly disclosed for the first time during the discovery phase of a *qui tam* suit is not barred from use in that same suit by section 3730(e)(4)(A)." 975 F.2d at 1416. In this case, the deficiency in the damping fluid was not disclosed during civil discovery, but as a result of the government's criminal investigation, which in turn may have been based on information Barajas had provided to the government. Barajas argues, and we agree, that there is no reason to draw a distinction

> between disclosure resulting from civil discovery by the government or a *qui tam* plaintiff, and disclosure resulting from a criminal investigation by the government based on information provided by a *qui tam* plaintiff. App., *infra* 9a.

The Ninth Circuit's adoption of the same "trigger" test used for its "original source" analysis not only ignores the statutory language quoted above and the District Court's factual findings, but directly conflicts with precedent in other Circuits.

1. *Barajas* Is In Clear Conflict With The Circuit Decisions in *Stinson* and *Kreindler*

The Third Circuit in *Stinson*, and the Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies*, both ruled that allegations which were disclosed during routine discovery in a civil case were "publicly disclosed" for purposes of Section 3730(e)(4)(A). In both of these cases, the *qui tam* relators were the attorneys who had filed the civil litigation and sought the discovery in which the allegations were disclosed. Therefore, under the Ninth Circuit test set forth in *Wang* and *Barajas*, there is no doubt that Mr. Stinson and the firm of Kreindler & Kreindler "played some part" in the public disclosure of the allegations in civil discovery. Yet both the Second and Third Circuits found there had been "public disclosure" and dismissed these cases.

The Ninth Circuit's decision in *Barajas* conflicts with the Second and Third Circuits. Without mentioning *Stinson* or *Kreindler*, the Ninth Circuit ruled that the cold temperature allegations were not "publicly disclosed" as to Barajas if he "played some part" in the investigation which resulted in the disclosure. This is directly at odds with *Stinson* and *Kreindler & Kreindler*. There is no doubt that the facts in *Barajas* would have resulted in dismissal by the Second and Third Circuits.

2. The Ninth Circuit's New Rule Conflicts With The Tests Set Forth By The Tenth Circuit In *Precision*

In its ruling in *Barajas*, the Ninth Circuit has held that there is only *one* test for satisfying Section 3730(e)(4), that is, "playing some part" in the public disclosure. The Court has thus merged the "public disclosure" test with the "original source" test. The Tenth Circuit in *Precision* specifically warned against merging the "public disclosure" and the "original source" tests:

> These two inquiries should not be collapsed. The district court was absolutely correct in concluding the 'unless' clause of this provision is not implicated until the 'based upon' issue is resolved. * * * However, we disagree with the *Le Valley* court's analysis insofar as it collapsed the two separate inquiries of § 3730(e)(4)(A) and (B). [971 F.2d at 552-553 n.2].

Moreover, the clear, objective test for public disclosure established by Congress in Subsection (e)(4)(A) becomes highly subjective: whether a suit is based on publicly disclosed allegations comes to depend on the person bringing the suit, not on whether the allegations were in fact "publicly disclosed" before the suit was filed. The result is that allegations are "publicly disclosed" to the entire world except for the person who "played a part" in the public disclosure.

Finally, the Ninth Circuit made an enormous logical leap — without any precedent or support whatsoever — by equating information generated by the relator from the fruits of his or her own discovery labor with information generated by the Government in a wholly separate investigation. The *qui tam* provisions of the False Claims Act are designed to encourage those who know of fraud to disclose it, as Barajas did with the test falsifications. These provisions are not designed to reward those who seek to enrich themselves on the *Government's* labor.

CONCLUSION

The Ninth Circuit's decision in *Barajas* misinterprets the key jurisdictional provision of the civil False Claims Act. If allowed to stand, parasitic suits will be allowed in the Ninth Circuit, and properly precluded in other circuits. With the constitutionality of these *qui tam* cases no longer before this Court, it is particularly critical that this petition for a writ of *certiorari* be granted to resolve this heavily litigated jurisdictional issue and bring the law in the Ninth Circuit in line with all other Circuits.

Respectfully submitted,

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